the tenant holds for a *certain number of years*, the doctrine at common law is that he is not entitled to emblements; "for the tenant knew the expiration of his term, and therefore it was his own folly to sow what he could never reap the profits of." 2 Bl. Com. (145). In England, however, the tenant for a term certain may be entitled, as emblements, to the crops sown before his lease expires (called the waygowing crops), by the particular custom of the district where the land is situated. See *Wigglesworth v. Dallison*, 1 Doug. 201. But no particular custom of this kind can exist in Virginia; and in *Harris v. Carson*, 7 Leigh, 630, it is held: (1) that at common law where land is leased for a fixed and determinate period, the offgoing tenant is not entitled to the waygoing crop; (2) that parol evidence of a usage for the offgoing tenant to have the waygoing crop is not admissible to explain a written contract of lease for a fixed and certain period; and (3) that a practice or usage in opposition to the common law, however general it may be, has no force in Virginia on the ground of custom, because *not immemorial*. But in other States the offgoing tenant has been allowed the waygoing crop on the ground of particular custom; immemoriality not being so strictly insisted on as to make such a custom impossible in America. See *Stultz v. Dickey*, 5 Binn. (Pa.) 285 (6 Am. Dec. 411); *Daniel v. Brown*, 134 N. H. 505 (69 Am. Dec. 515 and note). A tenant at will is entitled to emblements when the tenancy is determined by the landlord. 2 Bl. Com. (146). But a tenant by sufferance is said not to be entitled to emblements. *Doe v. Turner*, 7 M. & W. 226; 1 Washb. R. P. (103).

As we have seen, the Code of 1887, sec. 2806, now declares that "in all cases the right to emblements shall be as at common law;" thus repealing the troublesome statutes by which the right was formerly regulated. But sec. 2807 of the Code enacts that "The tenant who is entitled to emblements, or his personal representative, shall pay a reasonable rent for so much land as the emblements shall occupy, in the same proportion as it shall bear in quantity and value to the entire premises; and such rent shall be apportioned among the owners of the reversion, if there be more than one, according to their respective interests." And sec. 2808 enacts: "If any land has been prepared by the tenant previous to the expiration of the lease, for the purpose of putting a crop into the ground, under such circumstances as would have entitled the tenant, or his personal representative, to emblements, if the crop had been put in, those who succeed to the land shall pay a reasonable compensation for such preparation." Whether the tenant shall pay rent for the premises occupied by the emblements is doubtful at common law; sec. 2807 settles it in favor of the landlord. And at common law the mere preparation of the soil for crops will give the tenant no right to emblements, if they have not been actually planted when his estate terminates; sec. 2808 allows reasonable compensation to the tenant in this case.

RIGHT OF INFANTS TO AVOID CONTRACTS—FRAUDULENT REPRESENTATION OF AGE.—(1) *Action on the Contract.*—The rule seems to be pretty well settled that an infant's right to avoid a contract made by him is not impaired by the fact that he has made false representations as to his age at the time of entering into the agreement. This doctrine has been recently reaffirmed in the late case of *Alt v. Groff* (Minn.), 68 N. W. Rep. 9. There has been a good deal of interesting discussion on the question of the effect of fraudulent misrepresentations as to age made by minors, and the decisions are not altogether harmonious.

On this question of estoppel the decisions hold that the very fact of entering into a contract is an implied representation that the infant has power to do so, and it cannot be strengthened by an explicit statement of that which is implied from the very act itself. Thus in *Sims v. Everhardt*, 102 U. S. 300, the court used the following language:

"A conveyance by an infant is an assertion of his right to convey. A contemporaneous declaration of his right or of his age adds nothing to what is implied in the deed. An assertion of an estoppel against him is but a claim that he has assented or contracted. But he can no more do that effectively than he can make the contract alleged to be confirmed."

But above and beyond this rule, based on technical reasons, the policy of the law, which is at the foundation of all these decisions on the subject of infancy, forbids an exception in case the infant makes a false representation as to age. As said in *Conrad v. Lane* (Minn.), 4 N. W. 695:

"To make an exception to the rule in cases in which the infant has at the time of making an alleged contract represented himself to be of age, would be a manifest infringement upon the policy of the law—a disregard of the reasons upon which it is founded, and of the purpose which it has in view, viz.: To protect the infant from being drawn into contracts which it is not necessary for him to make, and of which he is not capable of judging."

And in this connection we cannot refrain from citing the language in *Conroe v. Birdsall*, 1 Johns. Cas. 127, 1 Am. Dec. 105, as follows:

"Attempts to shake principles which have been sanctioned by the practice of ages, ought to be well considered before they receive the countenance of a court of justice. If an allegation like the present were ever permitted to destroy an infant's right of avoiding contracts, not one in a hundred of his contracts would be placed in his power to avoid, for nothing would be easier than to prevail upon the infant to make a declaration which might be shown as evidence of deliberate imposition on his part, though prompted solely by the person intended to be benefited by it."

The following cases all adhere firmly to the rule that misrepresentations as to age do not estop a minor to plead his infancy: *Burdett v. Williams*, 30 Fed. Rep. 697; *Whitcomb v. Joslyn*, 51 Vt. 79, 31 Am. Rep. 678; *Wieland v. Kobick*, 110 Ill. 16; *McKamy v. Cooper* (Ga.), 8 S. E. Rep. 312; *Meniom v. Cunningham*, 11 Cush. 410.

It is settled beyond cavil that a mere failure by an infant to disclose his age is not a misrepresentation. *Baker v. Stone*, 136 Mass. 405; *Thormaehler v. Kaeppel* (Wis.), 56 N. W. 1089.

Courts of equity, which draw their principles more from substance than form, are privileged to occasionally set aside rules of law which operate harshly, and they will, in cases where gross fraud has been practiced, compel an infant to abide by a contract which he has induced another to enter into in the belief that he was of full age. This is, however, an extraordinary doctrine, and only to be enforced where it is clearly necessary to prevent the perpetration of a fraud. *Evans v. Morgan* (Miss.), 12 So. Rep. 270; *Charles v. Hastedt* (N. J.), 26 Atl. Rep. 564.

(2) *Action for the Deceit.*—The question of whether an action of deceit can be maintained against an infant who fraudulently represents himself to be of full age,

is a mooted one. It has been decided both ways. The Supreme Court of Indiana has decided that it can, in *Rice v. Boyer*, 9 N. E. Rep. 420. The court says:

"Our judgment, however, is that where the infant does fraudulently and falsely represent that he is of full age, he is liable in an action *ex delicto* for the injury resulting from his tort. This result does not involve a violation of the principle that an infant is not liable where the consequence would be an indirect enforcement of his contract; for the recovery is not upon the contract, as that is treated as of no effect, nor is he made to pay the contract price of the article purchased by him, as he is only held to answer for the actual loss caused by his fraud. In holding him responsible for the consequences of his wrong, an equitable conclusion is reached, and one which strictly harmonizes with the general doctrine that an infant is liable for his torts. Nor does our conclusion invalidate the doctrine that an infant has no power to deny his liability, for it concedes this, but affirms that he must answer for his positive fraud."

On the other hand, the Supreme Court of Vermont, in *Nash v. Jewett*, 18 Atl. Rep. 47, has reached exactly the opposite conclusion, and states its reasons as follows:

"While it is true as a general proposition of law, that infants are liable for their torts, yet the form of action does not determine their liability, and they cannot be made liable when the cause of action arises from a contract, although the form is *ex delicto*. A reference to the declaration in the case shows that the representations made by the defendant as to his age, using the concise language of Chief Justice Pierpoint in *Doran v. Smith* (49 Vt. 353), 'enter into and constitute an element of the contract itself; it is that that makes them actionable. The contract must be alleged and proved or there can be no recovery. The contract is the basis of the action. The fraud is predicated upon the contract.'"

There is a dictum in *Davidson v. Young*, 38 Ill. 145, to the effect that:

"Undoubtedly an infant is responsible in damages for his torts and frauds. If he were to falsely allege himself to be of age, for the purpose of inducing another person to purchase and take a deed of lands, he would be liable to respond in damages for any injury which might result to the purchaser in consequence of the deceit."

This, however, cannot be said to be anything more than a dictum.

It is settled that in case of a misrepresentation, the defrauded party can rescind the contract and recover back the goods. *Badger v. Phinney*, 15 Mass. 329; *Neff v. Landis* (Pa.) 1 Atl. Rep. 177; *Kitchen v. Lee*, 1 Paige, 107.

Just what the true rule is as to the right to maintain an action of deceit for fraudulent representations as to age, it is difficult to say, in view of the decisions. On the one hand, it can be urged that there was a material misrepresentation which induced the party to do something which he would not otherwise, and which has resulted in injury to him. On the other, it is to be remembered that the wise policy of the law has thrown around infants an immnnity from contracts which they may enter into. It is a disability which they cannot remove. No declaration of theirs can give vitality to a contract. Whatever rights are sought to be enforced against them grow out of the contract. In the ordinary action of *assumpsit*, the infant is sued because he did not keep his contract. In the action of deceit, he is sued because he made a false representation which induced the plaintiff to make a contract with him. He exercised his legal right to break that

contract, and because of that fact the plaintiff is injured. Whatever damages have been suffered flow from this breach of contract—this exercise of a legal right. If there had been no breach there would have been no damages. It is but a roundabout way of reaching the same conclusion. When it is considered that the policy of the law, for the protection of the infant, forbids a recovery either on the ground of contract or estoppel, it seems somewhat anomalous that that same policy of protection should allow an action in *ex delicto*, when a judgment in that form is followed by so much more serious consequences.—*National Corporation Reporter.*

This subject is discussed at length in an extensive note to *Craig v. Van Bebber* (Mo.), in 18 Am. St. Rep., at pp. 633, 720–724. This note contains the most learned and elaborate treatise on Infants' Contracts that we know of anywhere in the whole bibliography of the law. It covers more than 150 pages, and seems to be exhaustive, whether from the standpoint of principle or authority.

See further on the subject of misrepresentation of age: Cooley on Torts, 110; Schouler on Dom. Rel. 568; Benjamin on Sales, 22; note to *Humphrey v. Douglas*, (Vt.), 33 Am. Dec. 177, 184.

FORMALITIES FOR MAKING A WILL IN ENGLAND AND IN VIRGINIA.—1. *The English and Virginia Statutes.* (*a*) *In England.* By statute of 1 Victoria, ch. 26, sec. 9 (taking effect Jan. 1, 1838), it is enacted that, "No will shall be valid unless it shall be in writing, and executed in the manner hereafter mentioned; that is to say, it shall be signed at the foot or end thereof by the testator, or some other person in his presence and by his direction, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and such witnesses shall attest, and shall subscribe the will in the presence of the testator; but no form of attestation shall be necessary." See 3 Jarman on Wills, Appendix, 721–805, for the whole Wills Act of 1837. This statute is substantially followed in many of our States. By it the same formalities of execution are required of wills of both realty and personalty, and all wills (olograph or not olograph) are required to be attested by at least *two* witnesses. The English Statute of Frauds required *three* witnesses; but this applied to wills of *land* only. It has been followed in this respect in a number of American States (Georgia and Maryland for example), which require *three* witnesses to a devise.

(*b*) *In Virginia.* By Code of Virginia, sec. 2514: "No will shall be valid unless it be in writing, and signed by the testator or by some other person in his presence and by his direction, in such manner as to make it manifest that the name was intended as a signature; and moreover, unless it be wholly written [olograph] by the testator, the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses, present at the same time; and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary." The statute took effect July 1, 1850 (Code of 1849, ch. 122, sec. 4), and is based on the Wills Act of 1 Victoria. But observe these differences between England and Virginia:

As to signature. The English statute requires a will to be signed "at the foot or end thereof," but the Virginia statute says, "signed in such manner as to